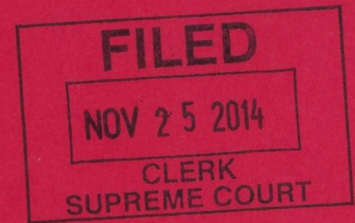


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-CA-001968-WC
CLAIM NO. 2009-99663



2014-SC-536

WEBSTER COUNTY COAL, LLC (DOTIKI
MINE)

APPELLANT

V.

**BRIEF OF APPELLANT, WEBSTER
COUNTY COAL, LLC**

MARSHALL D. PARKER, SR.,
STEVEN G. BOLTON, ALJ, MULTICARE
MADISONVILLE, DR. RICHARD
HOLZKNECHT, COOP HEALTH SERVICES,
DEACONESS HOSPITAL, DAVID D.
EGGERS, M.D., NEUROSURGICAL
CONSULTANTS, JAMES M. DONLEY, M.D.,
CENTER FOR ORTHOPEDICS, WAYNE C.
COLE, D.O., KELLY L. COLE, D.O.,
WORKERS' COMPENSATION BOARD &
KENTUCKY COURT OF APPEALS

APPELLEES

A handwritten signature in black ink, appearing to be "S. Dawson".

Hon. Stanley S. Dawson, Esq.
FULTON & DEVLIN, LLC
1315 Herr Lane, Suite 210
Louisville, Kentucky 40222
(502) 813-7804
Attorneys for Appellant
Webster County Coal, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on November 24, 2014, by mailing the original and nine copies to Susan Stokley Clary, Clerk, Kentucky Supreme Court, State Capitol Building, Room 209, 700 Capital Avenue, Frankfort, KY 40601-3488, with true copies hereof to: T. Lawrence Hicks, Esq. Cetrulo, Mowery & Hicks, PSC, 130 Dudley Road, Ste. 200, Edgewood, KY 41017; and Hon. Steven G. Bolton, Administrative Law Judge, 657 Chamberlin Avenue, Frankfort, KY 40601; John Morton, Esq., P.O. Box 883, Henderson, KY 42419; Deaconess Hospital, 600 Mary St., Evansville, IN 47747; Deaconess Hospital, P.O. Box 152, Evansville, IN 47701; Deaconess Health System, P.O. Box 1230, Evansville, IN 47706; Neurosurgical Consultants, 520 Mary St., Ste. 470, Evansville, IN 47710; David D. Eggers, M.D., 520 Mary St., Ste. 470, Evansville, IN 47710; Center for Orthopaedic Services, 44 McCoy Ave., Madisonville, KY 42431; James M. Donley, M.D., 44 McCoy Ave., Madisonville, KY 42431; Center for Orthopedics, P.O. Box 280, Madisonville, KY 42431; Wayne C. Cole, DO, P.O. Box 310, Providence, KY 42450; Kelly L. Cole, DO, P.O. Box 310, Providence, KY 42450, Workers' Compensation Board, Department of Workers' Claims, Appeals Division, Prevention Park 657 Chamberlin Avenue, Frankfort, KY 40601, and Hon. Sam Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



Stanley S. Dawson

MAY IT PLEASE THE COURT:

INTRODUCTION

This is a workers' compensation appeal in which the issue is whether Appellee/Plaintiff below, Marshall Parker (hereinafter "Parker"), sustained a work-related low back injury entitling him to past and future medical benefits. Parker also appeals separately, alleging that KRS Chapter 342.730(4) is unconstitutional.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant/Employer, Webster County Coal, LLC (Dotiki Mine) (hereinafter "WCC"), does not believe oral argument would be helpful to the Court in deciding the issues presented.

STATEMENT OF POINTS AND AUTHORITIES

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COUNTER-STATEMENT OF THE CASE

WCC appeals from earlier decisions of the Court of Appeals, Workers' Compensation Board, and Administrative Law Judge finding that Parker has a work-related low back condition connected with his admittedly compensable September 8, 2008 work injury to his right knee. As stated, Parker injured his right knee on September 8, 2008, in the course of his employment as a belt mechanic. On that date, he was checking a broken belt in muddy terrain. He crossed from one side of the belt to the other to inspect it. He tried to do so by stepping on and over the belt. He fell when his feet slid out from under him. He continued to work and did not get medical treatment until October 8, 2008. He initially saw orthopedic surgeon, Dr. James Donley of Madisonville, Kentucky. He did not complain of his low back, instead focusing on his right knee. (Parker depo, 4-14, 26-34) Notwithstanding the lack of documentation of an initial low back complaints, Parker subsequently testified in litigation that his initial pain involved the low back as well as the hip, knee, and leg. (Parker depo, 26-29) Parker did eventually complain to Dr. Donley about his back. He came under the care of Dr. David Eggers, spine surgeon in Evansville, Indiana. Dr. Eggers performed fusion operation on Parker's low back on June 2, 2011. (Dr. Eggers records)

Parker subsequently filed a Department of Workers' Claims Form 101 and litigation commenced. During litigation, Dr. Eggers was asked by Parker's counsel to address Parker's condition by completion of a Form 107, which is a medical report designed by the Department of Workers' Claims for introduction of evidence in workers' compensation claims. Parker placed the Form 107 in evidence. At Section "H" of the Form 107, which pertains to causation, Dr. Eggers put a "x" in the space indicating the answer "yes" to the question "[w]ithin reasonable medical probability, was Plaintiff's injury the cause of his/her complaints?" However, in Section "B" of the Form 107 titled "Plaintiff History" there is no specific reference to the specific mechanism of injury

reported by Parker as having occurred on September 8, 2008. Dr. Eggers stated only as follows : “5-4-2005 Initial Visit: patient has chronic right-sided neck pain since an injury in the mines when he bumped his head while operating a vehicle last September. Referred back on 5-20-09 for evaluation of primarily back and right leg numbness.” Thus, Dr. Eggers made no reference to the alleged belt-crossing event of September 8, 2008. Dr. Eggers instead referred to a completely different event that apparently happened in September of 2004. There is no indication whatsoever that Dr. Eggers has had any knowledge whatsoever of Parker having low back complaints before May 20, 2009. Dr. Eggers also failed to answer the other question posed in Section H of the Form 107 pertaining to causation, which asks, “[i]f the employee sustained more than one injury, which is the cause of his/her complaints?” Dr. Eggers also failed to offer an impairment rating or restrictions, or any apportionment of causation.

In addition to failing to relate the then-current back complaints to the September 8, 2008 accident, Dr. Eggers’ submissions portray an utter lack of knowledge of Parker’s relevant medical history. Parker had a documented history of substantial low back complaints and treatment pre-dating the work accident that is the subject of this claim. From 2003-2006, he was under treatment for his low back with multiple physicians at Tri-State Orthopedic Surgeons in Evansville, Indiana. The records of Tri-State Orthopedic Surgeons were placed in evidence. The records of Tri-State Orthopedic Surgeons documents back complaints dating to 2002, even though Parker did not seek treatment at Tri-State Orthopedic Surgeons until 2003. He was diagnosed by Dr. Gregory McComis as having degenerative disc disease with right radicular symptoms as of September 25, 2003. He was given a lumbar MRI and epidural injections. Dr. McComis thought that the MRI taken in 2003 portrayed multilevel degenerative discs and “bone on bone apposition at L3-4 with end plate edema.” WCC submits that the presence of such extreme findings can represent nothing less than an active

ongoing low back condition of which Dr. Eggers was unaware. Dr. McComis also found Parker had degenerative changes at L4-5, lateral recess stenosis and foraminal stenosis, and termed Parker's overall degenerative disc disease to be "moderate to severe." (Tri-State Orthopedic Surgeons records)

Parker returned to Dr. McComis in 2005, presenting on March 21, 2005 with back and leg complaints. At that time, Dr. McComis referred Parker to Dr. William Ante, who is also at Tri-State Orthopedic Surgeons. Dr. Ante administered a steroidal injection of the back on April 27, 2005. Apparently, this did not abate Parker's complaints, as Parker's wife contacted Dr. McComis on June 13, 2005, to advise that Parker's back and leg pain had increased. Dr. McComis ordered another MRI. On May 9, 2006, Dr. McFadden described Parker as having "...a history of chronic mid-low back pain stemming from a remote work injury." He diagnosed Parker as having sustained "...re-aggravation of a previous work injury on April 1, 2006." Dr. McFadden also found lumbar disc disease with a superimposed lumbar strain. (Tri-State Orthopedic Surgeons records) Parker also treated for his low back with Dr. Wayne Cole, his general practice physician, on March 13, 2000, September 21, 2001, and May 17, 2002. (Dr. Cole records) Dr. Eggers gave no indication that he was aware of any of this.

There can be no question that Dr. Eggers failed to identify within his Form 107 that Parker's back complaints were proximately caused by the effects of the September 8, 2008 work accident. Indeed, it cannot be ascertained from Dr. Eggers' Form 107 whether Dr. Eggers even knew that Parker had an injury on September 8, 2008. It is only clear that Dr. Eggers believed that Parker had an injury sometime prior to May 4, 2005, apparently in September of 2004. Dr. Eggers failed to comment on apportionment between or among the injuries. There is no demonstration that Dr. Eggers had any knowledge of the prior treatment with Tri-State Orthopedic Surgeons and Dr. Cole.

WCC had Parker evaluated by Dr. Russell Travis and Dr. William Gavigan during litigation. Dr. Travis initially opined that Parker's back complaints related to the September 8, 2008 event. However, after further review of the medical records, he withdrew that opinion and, by addendum, ultimately stated that he believed that Parker's low back condition was not related to the September 8, 2008 knee injury. (Travis IME report and addendum) Dr. Gavigan offered an unequivocal opinion in his evaluation report that the condition was active prior to September 8, 2008 and related the supposed need for lumbar fusion and other treatment to the pre-existing condition. (Gavigan report) Plaintiff offered no other medical proof on causation.

The issue of causation of the low back condition was preserved for a decision by the Administrative Law Judge. The Administrative Law Judge issued an Opinion, Order, & Award on February 21, 2013. In discussing the medical evidence, he noted that, while Dr. Eggers checked "yes" in the box asking whether it was within reasonable medical probability that Plaintiff's injuries caused his complaints, Dr. Eggers also "...failed to complete the section containing an explanation of the causal relationship...." The ALJ also explicitly stated that, "Dr. Eggers' opinion is at the back injury is work related to the 9/8/08 traumatic event but that he [Eggers] failed to properly analyze his opinions of causation and assign an impairment rating of the lumbar spine. The ALJ also conceded that there was no other treating or examining physician aside from Dr. Eggers who disagreed with Dr. Gavigan's finding that Parker's lumbar condition was not related to the September 8, 2008 work accident (OO&A, p. 20)

Despite these explicit findings, the ALJ nonetheless found the low back condition compensable in connection with the September 8, 2008 work accident. Stating that "...the burden of proving the existence of a pre-existing condition falls on the employer" and that the "...physicians of record...are not qualified to opine on the legal effect" of the etiology of a given medical condition,

the ALJ noted that "...the evidence is uncontested that the Plaintiff worked for a little more than two (2) years immediately prior to the date of injury unhindered by the condition of his lumbar spine. It was only after the work related accident of September 8, 2008, that his complaints of back pain and related symptoms led to the spinal fusion surgery...." While the ALJ correctly recited that for a condition to be pre-existing and active must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work related injury, and that "...the burden of proving an existence of a pre-existing condition falls upon the Employer," the ALJ apparently determined that the September 8, 2008 work accident aroused a dormant pre-existing condition of the low back into disabling reality in the absence of any credible medical evidence supporting that conclusion. The determination of a medical causation relationship in the form of arousal was apparently based entirely on lay/nonmedical evidence such as Parker's attendance record leading up to the September 8, 2008 accident. The ALJ erroneously stated that a worker with an active disability would be categorically prevented from working 70-80 hours per week. This statement was apparently based on the mistaken assumptions that one would have to be permanently and totally disabled and completely unable to work for a medical condition to be active and that the Claimant's work record is an acceptable substitute for medical evidence tracing a condition to a specific single accident. Despite the his own recognition of the complete absence of any medical evidence establishing a causal link between the September 8, 2008 event and the low back complaints, the ALJ found the low back complaints compensable and deemed WCC liable for medical benefits regarding the low back pursuant to the September 8, 2008 event.

WCC petitioned the ALJ for reconsideration, but WCC's Petition for Reconsideration was summarily overruled without explanation other than a statement by the ALJ asserting that there was no patent error appearing on the face of the Opinion. WCC appealed the determination against it on

medical causation on the low back condition to the Workers' Compensation Board. The Workers' Compensation Board affirmed the ALJ's finding on causation, though it vacated in part and remanded on other grounds pertaining to parallel medical fee disputes that had not been resolved by the ALJ at the time of the appeal. With due respect to the Workers' Compensation Board, its Order on appeal was "boiler plate" in nature as to the causation issue raised by WCC. The Board essentially found that the ALJ had not clearly rejected Dr. Eggers' opinion on causation. The Board also erroneously stated that Dr. Eggers "clearly indicated that Parker's current low back condition was caused by the work accident." (WCB decision, p. 16) As noted above, there is no such clear statement contained in Dr. Eggers' Form 107. The Board also relied upon the lack of any evidence of ongoing low back complaints to over two years prior to the work injury, thereby neglecting the fact that, regardless of whether it is the Employer's burden to prove a pre-existing active condition, it is always the Plaintiff's burden to prove work relatedness in regard to the effects of a current injury.

WCC then petitioned the Court of Appeals for a review of the lower decisions. Again, with all due respect to the Court of Appeals, it also overlooked the fact that Dr. Eggers did not relate any knowledge of the September 8, 2008 work accident of Parker's back problems before that date, and did not offer a statement relating the current low back problems to an event on September 8, 2008. The Court of Appeals also affirmed the ALJ's decision on causation. WCC filed this timely appeal of the Court of Appeals decision.

ARGUMENT

I. THE FINDING OF THE ALJ THAT PARKER SUSTAINED A LOW BACK INJURY IN THE SEPTEMBER 8, 2008 ACCIDENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

WCC respectfully submits that the ALJ's decision and those of the Workers' Compensation Board and Court of Appeals thereafter must be reversed with directions that the low back claim must be dismissed. The opinion of Dr. Eggers, with its deficiencies noted above, cannot be substantial evidence sufficient to support a finding of a work injury to the low back on September 8, 2008. As stated, the ALJ himself found Dr. Eggers' opinion to be defective and inferior to those of the other physicians, and conceded that there was no other medical evidence that would support Parker's position as to the compensability of the low back condition in connection with the September 8, 2008 accident. Close analysis of the Form 107 of Dr. Eggers, the only document supporting a causal relationship, shows that Dr. Eggers never even recited the existence of a September 8, 2008 accident, nor did he provide a statement attributing a low back condition to such an accident. A close reading of Dr. Eggers' Form 107 shows that the "September" event he was referring to was from September of 2004. That supposed 2004 event was not alleged as part of this litigation and is of course now barred by the applicable Statute of Limitations. Parker never plead the occurrence of a long-term cumulative trauma. Quite simply, the Form 107 does not say what it has been taken to say regarding causation. Parker had no medical evidence to support the finding of the ALJ.

When the cause of a condition is not readily apparent to a lay person, medical testimony supporting causation is required. Mengle v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981) Medical causation must be proven by a medical opinion within reasonable medical probability. Lexington Cartage v. Williams, 407 S.W.2d 397 (Ky. 1966). The mere possibility that a condition is work related is insufficient. Pierce v. Kentucky Galvanizing

Company, Inc., 606 S.W.2d 165 (Ky. App. 1980) Despite what the ALJ did in this case, given the substantial history of pre-existing back problems, it cannot be reasonably stated that causation would be readily apparent to a lay person in this case, at least as to Parker's low back complaints. On this point, it should be noted that the causation of Parker's knee injury and that of his low back condition are distinctly separate questions. The causation issue pertaining to the back condition is more difficult and, from Parker's standpoint, lacking in medical documentation in his favor. There is also no authority for the apparent assumption of the Court of Appeals that the occurrence of one definitely compensable condition relating to a work accident eliminates the need for medical causation evidence as to any other condition subsequently alleged to be related to the work accident. With due respect to the Court of Appeals, such a rule would lead to absurd and unjust results if it did exist.

In addition to the lack of any statement within Dr. Eggers' Form 107 relating the back condition to the September 2008 event, Dr. Eggers' lack of knowledge of Parker's relevant medical history also renders any opinion he might have rendered in favor of Parker on causation insufficient to support an award. In Cepero v. Fabricated Metals Corporation, 132 S.W.3d 839 (Ky. 2004) this Court stated that "...where it is irrefutable that a physician's history regarding work related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence. Cepero at 843. Herein, the history recited by Dr. Eggers is both incomplete and inaccurate. Therefore, even if Dr. Eggers had stated that it was a September 2008 event that played a causal relationship in the development or arousal of the low back condition, his support for doing so would be insufficient to support the Award, due to the Cepero rule.

WCC also submits that competent medical proof of causation is required even if it is asserted

that the low back condition was the product of the arousal of a dormant pre-existing condition by the effects of the September 8, 2008 work accident. Given the lack of such evidence, the decision of the ALJ and the other adjudicated bodies must be reversed. In McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), while rendering employers liable for the arousal of dormant pre-existing conditions under KRS Chapter 342 as amended in 1996 and thereafter, this Court nonetheless reiterated that it must be established that the injury in question is the proximate cause of the condition or disability. As set forth at length herein, the evidence of such a relationship between the injury and the low back condition is insufficient to support an award. There is no means by which lay testimony is sufficient to establish arousal. Just like the direct effects of the injury, there must be medical evidence of the arousal.

The Administrative Law Judge has essentially awarded a claim with no medical evidence of causation. For the reasons set forth above, his decisions, as well as those of the Workers' Compensation Board and Court of Appeals thereafter, were erroneous. While Parker's knee claim was admittedly compensable and has been voluntarily paid by WCC, WCC should not have been held liability for benefits pertaining to the low back based on the record before the ALJ.

CONCLUSION

For the above reasons, WCC respectfully requests that the Court reverse the decisions of the Administrative Law Judge, the Workers' Compensation Board, and Court of Appeals herein and that it remand this case to the Administrative Law Judge with directions that the low back claim must be dismissed due to lack of substantial evidence supporting the finding of such a work injury.

Respectfully submitted,

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Hon. Stanley S. Dawson
FULTON & DEVLIN, LLC
1315 Herr Lane, Suite 210
Louisville, Kentucky 40222
(502) 813-7804
Attorneys for Appellant/Appellee
Webster County Coal, LLC